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PP

v.

ABDUL RAHMAN AKIF

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FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ (MALAYSIA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ARIFIN ZAKARIA FCJ
[CRIMINAL APPEAL NO: 05-64-2002 (J)]

C

22 JUNE 2007

CRIMINAL PROCEDURE: *Dangerous drugs - Trafficking in 4826.9 grammes of cannabis - Element of possession - Drugs found in packages under seats of car driven by accused - Accused alone in car and in*

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possession of car for 7 months prior to arrest - Whether having physical control of drugs and possessing requisite knowledge as to contents of packages - Inference as to knowledge - Whether deducible from totality of evidence - Presumption of trafficking - Whether applicable - Dangerous Drugs Act 1952, ss. 6, 37(d), 37(da) 39B(1)(a), 39A(2)

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The respondent was arrested on 9 May 1996 at about 3.30 am at Jalan Kubur, Bakar Batu, Johor Bahru, moments after alighting from the car he was driving. Upon searching the car, the police party found three packages of compressed plant materials from

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under the driver's and the front passenger's seats, which were later confirmed to be 4826.9 grammes of cannabis as defined under s. 2 of the Dangerous Drugs Act 1952 ('the Act'). The respondent was charged with and convicted of an offence of trafficking in the said offensive drugs under s. 39B(1)(a) of the

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Act, and was sentenced to death. In convicting the respondent thus, the learned High Court judge found that the respondent must have custody and control of the drugs, since he was alone at the material time and was in possession of the car for some 7 months prior to his arrest. The learned judge also ruled, based on

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the cautioned statement which the learned judge admitted into evidence and in which the respondent had confessed to transporting the said cannabis to Jalan Kubur for sale, that the element of trafficking as defined in s. 2 of the Act was satisfied. Further, the learned judge also rejected the respondent's story that

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the packages of cannabis were placed in the car by one Jiri who told him that they were cloth samples meant for the respondent's

employer in Kuala Terengganu, or that, although he knew about the existence of the packages in the car he did not know that they contained cannabis.

The aforesaid findings notwithstanding, the learned judge's decision was on appeal disturbed by the Court of Appeal. Apparently, the Court of Appeal agreed with the trial judge on the issue of custody and control, but faulted him for admitting and relying on the respondent's cautioned statement. The facts, according to the Court of Appeal, could not sustain a charge of trafficking, since, to establish possession for the purpose of the Act, there has to be established knowledge of the drugs by the respondent (the trial judge did not make any finding on the issue of knowledge necessary to establish possession on account of his reliance on the cautioned statement). Be that as it may, the learned appellate judges deemed it proper and warranted to rely on the presumption under s. 37(d) of the Act, and in the circumstances ruled that the respondent was in presumed possession of the drugs. The Court of Appeal, hence, substituted the conviction with one of possession under s. 6 of the Act and commuted the sentence to 18 years imprisonment and 10 strokes of the rotan. Being dissatisfied, the prosecution appealed to the Federal Court and argued, primarily, that in the circumstances of the case, independent of the presumption under s. 37(d) of the Act, there was ample evidence for the court to draw an inference that the respondent knew what was contained in the three packages in question.

Held (allowing the appeal and affirming the High Court)
Per Arifin Zakaria FCJ delivering the judgment of the court:

(1) The proper approach to be adopted by the appellate court in the circumstances is, having held that the cautioned statement was wrongly admitted, it is for that court to scrutinize in totality the other evidence before it to see whether, quite apart from the cautioned statement, there is sufficient evidence to support the finding of the trial court. Regrettably, the Court of Appeal failed to adopt such a course before coming to its conclusion and it therefore falls upon this court to conduct such an exercise. (para 14)

(2) The incontrovertible facts as found by the trial judge was that the three packages were found in the car driven by the respondent, that the respondent was the only person in the car at the material time, that one package was found under the driver's seat and two packages under the passenger's seat and that the car was in the possession of the respondent for more than 7 months prior to his arrest. Under the circumstances, the trial judge was right in holding that at the material time the packages were in the custody and control of the respondent. (para 14)

(3) It is trite that what constitutes "possession" under s. 37 of the Act is a question of law. It is however a question of fact whether in a given case a person can be said to be in possession of something. In this case, bearing in mind the words of Shankar J in *Pendakwa Raya v. Kang Ho Soh*, the presence of the 3 packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drugs or things of similar nature. Likewise, on the authority of *Zulfikar bin Mustaffah v. PP*, the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. (paras 16 & 17)

(4) The irresistible inference to be drawn in the circumstances of the present case is that the respondent all along knew about the drugs found in the car. The fact that they were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. From the evidence of PW5 it is clear that little effort was required to uncover what was contained in the 3 packages. Consequently, the learned trial judge, properly directed on the law, would have come to the finding that *prima facie* the respondent had possession of the drugs independent of the statutory presumption under s. 37(d) of the Act. (para 24)

(5) As to the evidence of trafficking by the respondent in the said drugs, the amount of cannabis involved was well in excess of 200 grammes, thereby triggering the statutory presumption under s. 37(da) of the Act. Therefore, on the

facts, the trial judge had correctly, albeit for different reasons, called upon the respondent to enter upon his defence. (para 25)

(6) The defence story was highly improbable. If it is true that he came to Johor Bahru to collect cloth samples from Jiri, a question arises as to why the need to meet Jiri at 3.30 in the morning, and not at a more convenient time. Secondly, if the 3 packages contained cloth samples as claimed, a question also arises as to why they should be hidden under the seats of the car. The manner in which the 3 packages were concealed in the car goes to show that the appellant knew of the contents thereof. In the circumstances, the story about the meeting with Jiri must be highly fictitious. Consequently, we are satisfied beyond reasonable doubt that the respondent had custody and control of the three packages and knew they contained drugs. (para 27)

(6a) The respondent did not offer any explanation whatsoever as would rebut the presumption of trafficking under s. 37(da) of the Act and that presumption therefore stands unrebutted. (para 27)

[Appeal allowed. Order of Court of Appeal set aside. Conviction and sentence imposed by High Court reinstated and affirmed]

Bahasa Malaysia *translation of headnotes*

Responden telah ditangkap pada 9 Mei 1996 jam lebih kurang 3.30 pagi di Jalan Kubur, Bakar Batu, Johor Bahru, sejurus selepas beliau keluar dari kereta yang dipandunya. Setelah menggeledah kereta, pihak polis menjumpai tiga bungkusan yang mengandungi bahan tumbuhan yang dipadatkan di bawah tempat-tempat duduk pemandu dan penumpang hadapan, di mana bahan-bahan tersebut kemudian disahkan sebagai 4826.9 gram cannabis seperti yang ditafsirkan oleh s. 2 Akta Dadah Berbahaya 1952 ('Akta'). Responden telah dituduh dan disabitkan dengan kesalahan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta, dan dijatuhkan hukuman mati. Dalam mensabitkan responden, yang arif hakim Mahkamah Tinggi mendapati bahawa responden semestinya mempunyai jagaan dan kawalan terhadap dadah, oleh kerana beliau bersendirian pada waktu material dan mempunyai milikan kereta selama lebih kurang tujuh bulan sebelum ditangkap. Yang arif hakim juga mendapati, berdasarkan kepada kenyataan beramaran responden yang diterima-masuk sebagai keterangan oleh yang arif

A hakim dan di mana responden mengakui bahawa beliau membawa dadah ke Jalan Kubur untuk dijual, bahawa elemen-elemen pengedaran seperti yang ditafsir di bawah s. 2 Akta telah dipenuhi. Selain itu, yang arif hakim juga menolak cerita responden bahawa bungkusan-bungkusan cannabis diletakkan di dalam kereta oleh
B seorang Jiri yang mengatakan bahawa ia adalah contoh kain untuk diberikan kepada majikan responden di Kuala Terengganu, atau bahawa, walaupun beliau mengetahui tentang kewujudan bungkusan-bungkusan, beliau tidak tahu bahawa ia mengandungi cannabis.

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Walaupun dengan dapatan-dapatan di atas, keputusan yang arif hakim telah diganggu oleh Mahkamah Rayuan semasa rayuan. Mahkamah Rayuan nampaknya bersetuju dengan yang arif hakim mengenai soal jagaan dan kawalan, namun menyalahkannya kerana
D menerima-masuk dan bergantung kepada kenyataan beramaran responden. Fakta-fakta yang ada, menurut Mahkamah Rayuan, tidak dapat menampung satu pertuduhan pengedaran, oleh kerana, untuk membuktikan milikan seperti yang ditakrif oleh s. 2 Akta, adalah perlu dibuktikan bahawa responden mempunyai
E pengetahuan mengenai dadah tersebut (hakim bicara tidak membuat dapatan mengenai isu pengetahuan yang diperlukan bagi membuktikan milikan disebabkan pergantungannya kepada kenyataan beramaran). Walau pun begitu, yang arif hakim-hakim rayuan memandang sebagai wajar dan perlu untuk bergantung
F kepada anggapan s. 37(d) Akta dan atas alasan itu memutuskan bahawa responden mempunyai milikan dadah yang dianggapkan. Mahkamah Rayuan dengan itu menggantikan sabitan dengan sabitan milikan di bawah s. 6 Akta dan seterusnya meringankan hukuman kepada 18 tahun penjara dan 10 sebatan. Tidak
G berpuashati, pendakwaan merayu ke Mahkamah Persekutuan dan berhujah, secara pentingnya, bahawa, dalam halkeadaan kes, selain dari anggapan di bawah s. 37(d) Akta, terdapat bukti kukuh untuk mahkamah membuat inferens bahawa responden tahu mengenai apa yang terkandung di dalam ketiga-tiga bungkusan tersebut.

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Diputuskan (membenarkan rayuan dan mengesahkan Mahkamah Tinggi)
Oleh Arifin Zakaria HMP menyampaikan penghakiman mahkamah:

I **(1)** Pendekatan wajar yang harus diambil oleh sebuah mahkamah rayuan dalam halkeadaan di sini adalah, setelah mendapati bahawa kenyataan beramaran telah diterima-masuk secara

salah, mahkamah perlu meneliti keseluruhan keterangan untuk melihat sama ada, selain dari kenyataan beramaran, terdapat keterangan yang mencukupi untuk menyokong dapatan mahkamah bicara. Ini malangnya tidak dibuat oleh Mahkamah Rayuan sebelum mencapai keputusannya, dan dengan itu tugas berbuat demikian perlu dipikul oleh mahkamah ini.

(2) Fakta tak boleh disangkal seperti yang didapati oleh yang arif hakim adalah bahawa ketiga-tiga bungkusan dijumpai di dalam kereta yang dipandu oleh responden, bahawa responden ketika itu berseorangan di dalam kereta, bahawa satu bungkusan dijumpai di bahawa tempat duduk pemandu sementara dua yang lain dijumpai di bawah tempat duduk penumpang hadapan dan bahawa kereta berada dalam milikan responden selama tujuh bulan sebelum dia ditangkap. Dalam keadaan sedemikian, hakim bicara betul apabila merumuskan bahawa bungkusan-bungkusan pada waktu material adalah dalam jagaan dan kawalan responden.

(3) Adalah diterima bahawa sama ada "milikan" terbentuk di bawah s. 37(d) adalah satu persoalan undang-undang. Namun begitu, sama ada dalam sesuatu kes itu seseorang boleh dikatakan memiliki sesuatu barang adalah satu persoalan fakta. Dalam kes semasa, mengambilkira kenyataan Shankar H di dalam *Pendakwa Raya v. Kang Ho Soh*, kehadiran ketiga-tiga bungkusan di dalam kereta tanpa satu penjelasan yang menyakinkan diberi oleh responden boleh membangkitkan inferens kukuh bahawa beliau mempunyai pengetahuan bahawa bungkusan-bungkusan mengandungi dadah atau sesuatu yang serupa itu. Juga, berdasarkan autoriti *Zulfikar bin Mustaffah v. PP*, fakta bahawa dadah dijumpai dibungkus dengan suratkhabar bukanlah alasan untuk mengatakan bahawa suatu inferens tidak boleh dibuat terhadap responden bahawa dia mempunyai pengetahuan yang diperlukan.

(4) Inferens tak dapat tidak yang boleh dibuat dari halkeadaan kes semasa adalah bahawa responden pada sepanjang masa tahu tentang dadah yang dijumpai di dalam kereta. Fakta bahawa dadah dijumpai tersorok di bawah tempat duduk kereta dan dibungkus dengan suratkhabat berbahasa Cina tidak boleh membantu responden untuk menyangkal inferens. Dari keterangan PW5 jelas bahawa hanya sedikit usaha

diperlukan bagi membongkar apa yang terkandung di dalam ketiga-tiga bungkusan. Oleh yang demikian, yang arif hakim, bersandarkan arahan undang-undang yang betul, pasti akan mendapati bahawa *prima facie* responden mempunyai milikan dadah tersebut bebas dari anggapan statutori di bawah s. 37(d) Akta.

(5) Berhubung keterangan mengenai pengedaran dadah tersebut oleh responden, jumlah cannabis yang terlibat adalah jauh melebihi 200 gram sekaligus membangkitkan anggapan statutori di bawah s. 37(da) Akta. Oleh yang demikian, di atas fakta, hakim bicara betul apabila memanggil responden untuk membela diri walaupun atas sebab yang berbeza.

(6) Cerita pembelaan tidak mungkin benar. Jika benar responden datang ke Johor Bahru untuk mengambil contoh kain dari Jiri, persoalan berbangkit mengapa ia perlu dilakukan pada jam tiga pagi, dan tidak di waktu yang lebih sesuai. Kedua, jika ketiga-tiga bungkusan mengandungi contoh kain seperti yang didakwa, persoalan berbangkit mengapa ianya harus disorok di bawah tempat duduk kereta. Cara ketiga-tiga bungkusan disorok di dalam kereta menunjukkan bahawa responden tahu mengenai kandungannya. Oleh yang demikian, cerita mengenai perjumpaan dengan Jiri besar kemungkinan hanya diada-adakan. Maka kami berpuashati di luar keraguan munasabah bahawa responden mempunyai jagaan dan kawalan terhadap ketiga-tiga bungkusan dan tahu bahawa ia mengandungi dadah.

(6a) Responden tidak menawarkan sebarang penjelasan yang boleh menyangkal anggapan pengedaran di bawah s. 37(da) Akta dan anggapan tersebut dengan itu masih berdiri kukuh.

[Rayuan dibenarkan. Perintah Mahkamah Rayuan diketepikan. Sabitan dan hukuman yang dijatuhkan oleh Mahkamah Tinggi dipulih dan disahkan]

Case(s) referred to:

Chan Pean Leon v. PP [1956] 22 MLJ 237 ***(refd)***
Illian & Anor v. PP [1988] 1 MLJ 421 ***(refd)***
Lim Beng Soon v. PP [2000] 4 SLR 589 ***(refd)***
Ng Chai Kem v. PP [1994] 2 CLJ 593 SC ***(refd)***
PP v. Badrulsham Baharom [1988] 2 MLJ 585 ***(refd)***
PP v. Kang Ho Soh [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 HC ***(refd)***

PP v. Yuvaraj [1969] 2 MLJ 89 ***(refd)***
Ramis Muniandy v. PP [2001] 3 SLR 534 ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***
Yee Ya Mang v. PP [1972] 1 MLJ 120 ***(refd)***
Zulfikar Mustaffah v. PP [2001] 1 SLR 633 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 6, 37A, 37(da), 39A(2), 39B(1)(a), 39B(2)

For the appellant - Manoj Kurup, DPP
For the respondent - Hazman Ahmad; M/s Raja Badrol Hazman

Reported by WA Sharif

JUDGMENT

Arifin Zakaria FCJ:

Background

[1] The respondent was charged with an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") in the High Court at Johor Bahru for trafficking in cannabis weighing 4,826.9 grammes. He was convicted and sentenced to death by the said court. On appeal to the Court of Appeal, the conviction and sentence was set aside and substituted with an offence under s. 6, punishable under s. 39A(2) of the Act. The respondent was sentenced to 18 years imprisonment and 10 strokes. The prosecution now appeals to this Court against the decision of the Court of Appeal.

Prosecution's Case

[2] On 9 May 1996, at about 1am, acting on information received, ASP Nordin (PW5) and a team of police officers from Narcotics Unit Johor Bahru conducted a surveillance in the area of Jalan Kubur, Bakar Batu, Johor Bahru. At about 3.30am, PW5 saw a car bearing registration No. TT 2161 approaching the surveillance area and it came to stop under a shed. PW5 and Detective Sergeant Badron (PW6) noticed that the respondent was the driver of the car and he was alone in the car.

[3] When the respondent came out from the car and was about to lock the car, PW5 and his team moved towards the respondent, he introduced himself as police officer and arrested

A the respondent. PW5 then administered caution under s. 37A of the Act to the respondent and asked whether there was any contraband inside the car. When the respondent answered in the negative PW5 then took possession of the car key and conducted a search inside the car. He found one package under the driver's
B seat and two packages under the front passenger's seat. The 3 packages were found to contain 5 blocks of compressed plant material. The chemist, Mision bin Sulaiman (PW4), analyzed the 5 blocks of compressed plant material and confirmed that they were cannabis as defined under s. 2 of the Act having a net
C weight of 4,826.9 grammes. The respondent was accordingly charged for trafficking of the cannabis under s. 39B(1)(a) of the Act.

[4] Before the learned trial judge PW6 in his evidence testified
D that he saw the respondent was alone inside the car when the car TT 2161 was approaching the surveillance area. He followed the car closely until it came to be parked under a shed near the said area.

E **[5]** Ghazali Mohd (PW8) who runs a business under the name of "Zag Agency & Services" stated that the car bearing registration number TT 2161 was rented to the respondent since 27 September 1995 at a monthly rental of RM1,300.

[6] The chemist (PW4) in his evidence testified that he
F conducted the four standard tests namely the physical examination, microscopic examination, Duquenois Levine test and Thin Layer Chromatography test on the 5 blocks of compressed plant material. He confirmed that the said plant material was cannabis as defined in s. 2 of the Act having a net weight of
G 4,826.9 grammes.

[7] When the prosecution sought to tender the respondent's cautioned statement which was recorded on 11 May 1996, that is two days after his arrest, this was objected to by the defence
H on the ground that the cautioned statement was not voluntarily made by the respondent. A trial-within-trial was conducted and at the end of which the learned trial judge held that the cautioned statement was voluntarily made by the respondent. The cautioned statement was accordingly admitted in evidence.

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[8] At the end of the prosecution's case the learned trial judge held that a *prima facie* case had been made out against the respondent and then called upon the respondent to enter his defence.

[9] The respondent testified on oath that, on 8 May 1996, at around 9pm he left Kuala Terengganu heading towards Johor Bahru driving the car TT 2161 to meet an Indonesian man by the name of "Jiri". He met Jiri at the Mamak stall in Taman Sentosa, Johor Bahru. Jiri requested for the car key to put packages of cloth samples inside the car which were to be delivered to the respondent's employer. The respondent claimed that he did not know the actual content of those packages. Thereafter, the respondent and Jiri went to Tebrau at Jiri's request to meet Rozita. The respondent dropped Jiri at a nightclub in Tebrau before proceeding to Johor Bahru where he expected to collect more cloth samples from Jiri. At about 4.30am, 9 May 1996, when the respondent parked his car in front of a shop, several police officers rushed towards him and arrested him as he was coming out from the car. The respondent claimed that he was shocked. In answer to questions by PW5, he said he did not know what was the "barang" and where the "barang" was placed inside the car.

Finding Of The High Court

[10] The learned trial judge found that the respondent has custody and control over the said cannabis at the time of the arrest. And since the cannabis was found in the car driven by the respondent, this goes to prove that the respondent was transporting the cannabis to Jalan Kubur. Besides that the respondent had through his caution statement confessed to the fact that he was transporting the said cannabis to Jalan Kubur for sale. The learned trial judge held that the element of trafficking as defined in s. 2 of the Act was thus satisfied. On the totality of the evidence, the learned trial judge found that the respondent failed to raise any reasonable doubt on the prosecution's case and failed to rebut the statutory presumption under s. 37(da) on the balance of probabilities. The respondent was found guilty for trafficking under s. 39B(1)(a) of the Act and sentenced to death.

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Finding Of The Court Of Appeal

[11] Gopal Sri Ram JCA, delivering judgment of the Court of Appeal, stated that the main issue in the appeal was directed at the admission of the cautioned statement allegedly made voluntarily by the respondent two days after his arrest.

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[12] On this issue, the Court of Appeal agreed with the submission for the defence that the learned trial judge ought not in the circumstances of the present case to have admitted the cautioned statement. On that premise the Court of Appeal held that the charge of trafficking cannot be sustained, thus setting aside the conviction and sentence imposed by the High Court and substituted the same with the offence of possession under s. 6 of the Act, punishable under s. 39A(2) of the Act. The respondent was sentenced to 18 years imprisonment and 10 strokes.

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The Appeal

[13] Having held that the trial court had erred in admitting the cautioned statement, the Court of Appeal set aside the conviction under s. 39B(2) of the Act. The court, however, went on to hold that there was sufficient evidence establishing beyond doubt that the respondent had custody and control of the 3 packages containing 5 blocks of compressed plant material and, relying on s. 37(d) of the Act, it held that there is presumed possession of the drug. The prosecution, however, contended that in the circumstances of this case, independent of the presumption under s. 37(d) of the Act, there is ample evidence for the court to draw an inference that the respondent knew what was contained in the 3 packages.

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[14] We agree with the submission of the prosecution that the proper approach to be adopted by the appellate court in the circumstances is that, having held that the cautioned statement was wrongly admitted, then it is for the court to scrutinize in totality the other evidence before it to see whether, quite apart from the cautioned statement, there is sufficient evidence to support the finding of the trial court. Regrettably the Court of Appeal failed to adopt such a course before coming to its conclusion. Hence, it falls upon this court to conduct such an exercise. The incontrovertible facts as found by the trial court was that the 3 packages were found in the car driven by the respondent. He was the only person in the car at the material

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time. One package was found under the driver's seat and two packages under passenger's seat. PW8 gave evidence that the car was in the possession of the respondent for more than seven months prior to his arrest. In the circumstances we think the trial judge was right to hold that at the material time the 3 packages were in the custody and control of the respondent. Indeed the Court of Appeal agreed with the trial judge. But mere custody and control is not sufficient to establish possession for the purpose of the Act. There has to be established knowledge of such drug by the respondent. In *Chan Pean Leon v. Public Prosecutor* [1956] 22 MLJ 237 Thomson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 and at p. 239 he observed:

> "Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition, page 304):
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> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
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> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may

A be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.

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[15] And further down on the same page he added:

> Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.

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[16] It is trite that what constitutes "possession" under s. 37 of the Act is a question of law. (See *Yee Ya Mang v. Public Prosecutor* [1972] 1 MLJ 120 and *Public Prosecutor v. Badrulsham bin Baharom* [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something. And in relation to drug found in a vehicle Shankar J in *Pendakwa Raya v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557, after considering a number of authorities, stated:

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> … those cases do not decide that in all cases a person who is in sole charge of a vehicle cannot be found to be in possession of articles being carried in it. As Thomson J himself said in *Tong Peng Hong v. PP* at p 233:
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> > If something be found, for example, in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it …
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> Again, at p 234:
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> > I am not saying for one moment that a drug may not be found in a vehicle in such circumstances as would in the absence of disproof or explanation lead the court to the conclusion, quite independently of any statutory presumption, that it was in the possession of the person in control of the vehicle.
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[17] Therefore, the presence of the 3 packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages

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contained drug or things of similar nature. (See also *Lim Beng Soon v. Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in

newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v. PP* [2001] 1 SLR 633, at p. 639:

> 21. For the element of 'possession' (within the meaning of s. 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v. PP* [1978-1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
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> 22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. *Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible.* As Yong Pung How CJ remarked in *PP v. Hla Win* [1995] 2 SLR 424 (at p. 438):
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> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses. (emphasis added)

[18] In *Ramis a/l Muniandy v. Public Prosecutor* [2001] 3 SLR 534, the Singapore Court Appeal again propounded on the question of knowledge necessary to establish possession and at p. 541 states:

> **Knowledge of drugs**
>
> The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.

In *Tan Ah Tee (supra)*, Wee Chong Jin CJ, delivering the judgment of the court, said ([1978-1979] SLR 211 at 217-218; [1980] 1 MLJ 49 at pg. 52):

> Even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

[19] The issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v. PP (supra)*. In Warner the following question was posed to their Lordships:

> Whether for the purpose of section 1 of the Drugs (Prevention of Misuse) Act, 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware if its true nature.

[20] At p. 367 Lord Reid addressed the issue as follows:

> The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

[21] In the same case Lord Morris answered the question in following manner: A

> If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them. B C D

[22] Reverting to the present case, it is therefore incumbent upon the court to scrutinize the entire evidence before the court to see whether an inference can be drawn against the respondent that he knew about the drug in the 3 packages found in the car. It is not in dispute that the 3 packages were found hidden in the car under the driver's seat and under the front passenger's seat. He was alone in the car at the material time. One other important factor of relevance is that the car had been in his possession for the past seven months prior to his arrest. E F

[23] It is true that the trial judge did not make any finding on the issue of knowledge necessary to establish possession of the drugs, as he relied on the cautioned statement in coming to his finding. The Court of Appeal on the facts correctly found that there was sufficient evidence to find the respondent to be in custody and control of the 3 packages found in the car and relying on the presumption under s. 37(d) of the Act the Court of Appeal went on to hold that the respondent was in presumed possession of the drug. G H

[24] Applying the observations set out in the authorities cited above to the facts in the present case, the irresistible inference that may be drawn in the circumstances is that the respondent all along knew about the drug found in the car. The fact that they I

were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. From the evidence of PW5 it is clear that little effort was required to uncover what was contained in the 3 packages. Therefore, we are of the view that on the facts and in the circumstances of this case the learned trial judge, properly directed on the law, would have come to the finding that *prima facie* the respondent had possession of the drug independent of the statutory presumption under s. 37(d) of the Act.

[25] The next question is whether there is evidence of trafficking by the respondent in the said drug. In this case the amount of cannabis involved is 4,826.9 grammes in weight, which is well in excess of 200 grammes, thus triggering the statutory presumption of trafficking as provided in s 37(da) of the Act. Therefore, on the facts of this case it is our finding that the trial judge had correctly, albeit for different reasons, called upon the respondent to enter upon his defence on the charge.

The Defence

[26] We have set out the respondent's defence in the earlier part of this judgment. To recapitulate he said that on the day in question, he came to Johor Bahru, from Kuala Terengganu to collect cloth samples. The 3 packages found in the car was put there by one Indonesian man by the name of Jiri. This took place when he met Jiri at a Mamak stall in Taman Sentosa, Johor Bahru. Jiri told him they contained cloth samples. He did not know the actual contents of the 3 packages. After that he proceeded to Johor Bahru to collect more cloth samples from Jiri, but before that happened he was arrested by the police. He told the court that the cloth samples were meant for his employer in Kuala Terengganu. He worked for his employer on a commission basis. The learned trial judge in his judgment pointed out that the name Jiri, was only raised for the first time in his defence. It is also important to note that this alleged meeting with Jiri, took place at around 3.30am on 9 May 1996.

Finding Of This Court On The Defence Raised

[27] It is trite law that the court need not be convinced of the defence story to entitle the accused to an acquittal. The burden of proof on the accused is indeed a light one which is merely to cast a reasonable doubt on the prosecution's case. (See *Illian & Anor v. Public Prosecutor* [1988] 1 MLJ 421). In the present case

the respondent's defence was that although he knew about the existence of the three packages in the car, which he claimed were put in the car by Jiri, but he had no knowledge that they contained drug. He was informed by Jiri that they contained cloth samples. Upon close scrutiny we find his story to be highly improbable for the following reasons. Firstly, if it is true that he came to Johor Bahru to collect cloth samples from Jiri, the question is what was the need to meet Jiri at around 3.30 in the morning. Certainly this could have been done at a more convenient time. Secondly, if the 3 packages contained cloth samples as claimed by the respondent the question arises why should they be hidden under the seats of the car as found by the police. The manner in which the three packages were concealed in the car goes to show that the appellant knew of the content of the three packages. In the circumstances, we find his story about the meeting with Jiri to be highly fictitious. It was no more than an attempt to show that he had no knowledge of the content of the 3 packages. In the final analysis, we are satisfied beyond reasonable doubt that the respondent had custody and control of the three packages and he knew that they contained drug. Having so found the next issue is whether the defence had, on the balance of probabilities, successfully rebutted the presumption of trafficking under s. 37(da) of the Act. (See *PP v. Yuvaray* [1969] 2 MLJ 89 as applied in *Ng Chai Kem v. PP* [1994] 2 CLJ 593). In the present case the respondent did not offer any explanation whatsoever which goes towards rebutting the said presumption. It is our finding, therefore, that the presumption under s. 37(da) of the Act stands unrebutted.

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The Decision Of This Court

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[28] On the above premises the appeal herein is allowed and accordingly the order of the Court of Appeal is hereby set aside. The conviction and sentence imposed by the High Court are accordingly reinstated and affirmed.

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